STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Jansen, C.J., Kelly, Servitto, J.J.

ROBERTO LANDIN,

Plaintiff-Appellee,

v.

HEALTHSOURCE SAGINAW, INC.,

Defendant-Appellant

Supreme Court No. 149663

Court of Appeals No. 309258

Saginaw Circuit Court
No. 08-002400-NZ

BRIEF AS AMICUS CURIAE
BY MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

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STATEMENT OF QUESTIONS PRESENTED

The issue on which leave to appeal was granted is:

> **Whether the plaintiff may maintain a wrongful discharge claim for violation of public policy under MCL 333.20176a(1)(a)?**
>
> As amicus curiae, the Michigan Health and Hospital Association submits that the answer is "No."
>
> The Legislature provided specific remedies in MCL 333.20176a, and therefore, a tort action for wrongful discharge cannot be judicially implied.

The order granting leave directed the parties to address the following question:

> **Whether the Whistleblowers' Protection Act, MCL 15.361 et seq, provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a).**
>
> As amicus curiae, the Michigan Health and Hospital Association submits that the answer is "No."
>
> The remedies provided by the Legislature in MCL 333.20176a do not include a civil action under the whistleblowers' protection act.

STATEMENT IDENTIFYING INTEREST AS AMICUS CURIAE

The Michigan Health & Hospital Association ("MHA") is an association of hospitals, health systems, and other health care providers throughout Michigan that work together with patients, communities, and providers to improve health care for all Michigan citizens by addressing current issues that impact the ability of its members to deliver care. MHA's membership includes all of the state's community hospitals, from the largest urban teaching and trauma centers to small federally designated critical access hospitals serving Michigan's most rural communities.

Established in 1919, the MHA represents the interests of its member hospitals and health systems in both the legislative and regulatory arenas on key issues and supports their efforts to provide quality, cost-effective and accessible care. The mission of the MHA is to advocate for hospitals and the patients they serve. In that role, it promotes better health within communities; improved quality and safety of patient care; and improved coverage for high-quality, affordable health care services for all Michiganders. In addition, the Association provides members with essential information and analysis of health care policy and offers relevant education to keep hospital administrators and their staff current on statewide issues affecting their facilities. Using its collective voice, the MHA advocates for its members before the legislature, the courts, government agencies, the media and the public.

Together, MHA's members employ over 220,000 persons, many of whom are employed on an at-will basis.

STATEMENT OF POSITION AS AMICUS CURIAE

MHA wholeheartedly shares the Court of Appeals' belief that candid reporting of concerns about patient safety and quality of care furthers the public interest in good medical care. *Landin v HealthSource Saginaw, Inc*, 305 Mich App 519, 531; 854 NW2d 152 (2014). Indeed, all hospitals have policies requiring employees to report any incidents adversely affecting patient safety. Encouraging employees—and indeed all persons—to come forward with their concerns helps to promote and improve quality care.

MHA also agrees with the Legislature's decision to encourage employees and contractors to report their concerns about violations of the Public Health Code and administrative rules, unsafe practices and conditions, and malpractice by health professionals. The two key statutes, MCL 333.20180 and MCL 333.20176a, are good public policy. There are, however, critical differences between the two statutes that were overlooked by the Court of Appeals when recognizing an implied cause of action in tort for wrongful discharge based on an alleged violation of MCL 333.20176a.

MCL 333.20180(1) prohibits retaliatory action by a health facility or agency against an employee or contractor who reports a violation of Article 17 of the Public Health Code or rules promulgated under the article to the Department of Licensing and Regulatory Affairs (LARA), or who assists the department in its carrying out its duties. An employee or contractor who engages in the specified actions is protected under the whistleblowers' protection act. *Id*. In addition, MCL 333.20180(3) prohibits retaliatory action against an employee or contractor who reports an unsafe practice or condition to LARA. The reporting employee or contractor is also protected under the WPA, conditioned on compliance with certain notice requirements. MCL 333.20180(3)-(5).

The statute involved in this case, MCL 333.20176a(1), prohibits retaliatory action against an employee who reports the malpractice of a health professional or violations of statutes or rules under certain articles of the Public Health Code. Unlike MCL 333.20180, this statute does not provide that the employee is protected under the WPA. Instead, MCL 333.20176a(2) states that a health facility or agency that engages in retaliatory action in violation of this statute is subject to licensing sanctions under MCL 333.20165 and enhanced administrative fines.

MHA believes there are sound policy reasons for the different remedies provided in the two statutes. For purposes of this case, however, MHA's perspective on public policy does not matter. And, with respect, neither does the Court of Appeals' view.

When enacting a statute, the Legislature has the authority to decide whether to provide remedies or authorize a private right of action. The Court of Appeals ignored the difference between MCL 333.20180, which grants protection against retaliatory action by incorporating the remedy provided by the whistleblowers' protection act, and MCL 333.20176a, which does not. The result, both legally and practically, is recognition of an implied private right of action to enforce MCL 333.20176a, even though the Legislature specifically provided other means for enforcement.

Moreover, MHA believes that the implied wrongful discharge claim recognized by the Court of Appeals does not advance the goal of advancing the quality of patient care. To the contrary, hospitals may be reluctant to encourage reporting by employees if the result is the potential for costly and disruptive litigation whenever a reporting employee is subsequently disciplined. Moreover, litigating private tort claims based on reports of malpractice would threaten the confidentiality of non-party patients and the privilege for

their medical information. It would also intrude into matters protected against disclosure and use in litigation under Michigan's peer review statutes.

As amicus, MHA supports HealthSource's request for reversal of the Court of Appeals' decision. The Legislature decided to provide administrative sanctions as the remedy for violations of MCL 333.20176a. The Court of Appeals should not have judicially implied a different remedy.

STATEMENT OF FACTS

There are no facts relevant to MHA's position on the legal questions presented in this appeal.

ARGUMENT

I. The Court of Appeals erred by judicially implying a cause of action for wrongful discharge. The Legislature elected to enforce the prohibition against retaliatory action in MCL 333.20176a with licensing sanctions and administrative fines.

MHA submits that the Court of Appeals erred by recognizing an implied cause of action for wrongful discharge as a remedy to enforce the prohibition against retaliatory employment actions in MCL 333.20176a. There are two statutes in the Public Health Code prohibiting retaliatory action by health facilities and agencies against employees, contractors, and other persons. In MCL 333.20180, the Legislature provided a civil remedy under the whistleblowers' protection act for individuals subjected to retaliatory conduct. In MCL 333.20176a, the Legislature did not include a civil remedy, and instead authorized imposition of licensing sanctions and administrative fines on health facilities and agencies that violate the statute's prohibition.

Michigan recognizes an exception to the at-will employment doctrine, under which a court may imply a cause of action in tort for wrongfully discharging an employee in

violation of public policy. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). The exception is a narrow one, and with good reason. *Dudewicz v Norris-Schmid*, 443 Mich 68, 80; 503 NW2d 645 (1993).

Courts do not decide what the public policy of this State should be. That authority is constitutionally vested in the Legislature. "As a general rule, making social policy is a job for the Legislature, not the courts." *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002)(quoting *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999)). Respect for the Legislature's determination of public policy also includes respect for its choice of remedies for enforcing the policies declared in statutes. *People v Anstey*, 476 Mich 436, 445 n 7; 719 NW2d 579 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create."); *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 123-124; 252 NW2d 818 (1977)(parallel damage remedies are precluded when the Legislature has specified remedies in a statute).

The Court of Appeals disregarded these foundational principles when judicially implying a wrongful discharge claim. The Legislature enacted a comprehensive and detailed structure for regulating health facilities and agencies in Article 17 of the Public Health Code. There are three provisions, contained in two statutes, that prohibit health facilities or agencies from taking adverse employment action in retaliation for certain reports or threatened reports by employees. In each, the Legislature exercised its authority to prescribe the available remedies.

The first, MCL 333.20180(1), provides that a person employed by or under contract to a health facility or agency or any other person is protected under the whistleblowers' protection act if he or she, acting in good faith,

- "makes a report or complaint including, but not limited to, a report or complaint of a violation of this article or a rule promulgated under this article";
- "assists in originating, investigating, or preparing a report or complaint"; or
- "assists the [Department of Licensing & Regulatory Affairs] department in carrying out its duties under this article."

Subsection (1) states that a person who engages in the described actions "is protected under the whistleblowers' protection act . . . ."

An employee gains three additional protections. First, the employee is "immune from civil and criminal liability that might otherwise by incurred . . . ." MCL 333.20180(1) Second, the employee is "presumed to have acted in good faith." *Id*. Third, the employee is entitled to confidentiality "until disciplinary proceedings . . . are initiated against the subject of the report or complaint" and the employee "is required to testify in the disciplinary proceeding." MCL 333.20180(2).

The second provision is another subsection of the same statute. MCL 333.20180(3) provides that a person employed by or under contract to a hospital shall not be discharged, threatened, or otherwise discriminated against regarding compensation or terms, conditions, location, or privileges of employment if he or she "reports to the department, verbally or in writing, an issue related to the hospital that is an unsafe practice or condition that is not a violation of this article or a rule promulgated under this article." Subsection (3) states that its protections "do not limit, restrict, or diminish, in any way, the protections

afforded under the whistleblowers' protection act . . . ." In addition, a person reporting an unsafe practice or condition is "immune from civil or criminal liability that might otherwise be incurred." MCL 333.20180(3). The protections are conditioned, in most cases, upon providing the hospital with notice and an opportunity to correct the unsafe condition or practice. MCL 333.20180(4) and (5).

The statute involved in this case, MCL 333.20176a(1), is the third provision prohibiting retaliatory action. It states that a health facility or agency shall not discharge or discipline, threaten to discharge or discipline, or otherwise discriminate against an employee if he or she, or a person acting on his or her behalf:

> (a) In good faith reports or intends to report, verbally or in writing, the malpractice of a health professional, or a violation of this article, article 7, article 8, or article 15 or a rule promulgated under this article, article 7, article 8, or article 15,
>
> (b) Acts as an expert witness in a civil action involving medical malpractice or in an administrative action.

Subsection (2) provides that "[i]n addition to the sanctions set forth in section 20165, a health facility or agency that violates subsection (1) is subject to an administrative fine of not more than $10,000.00 for each violation."

Thus, the Legislature specifically provided in MCL 333.20180 that employees (and other individuals) are protected under the whistleblowers' protection act for reporting violations of Article 17 and promulgated rules, and conditionally protected for reporting unsafe practices or conditions. The protections afforded by the WPA include the prohibition against an employer discharging, threatening, or otherwise discriminating regarding the employee's compensation, terms, conditions, location, or privileges of

employment. MCL 15.362. The WPA authorizes a civil action for injunctive relief or actual damages against an employer. MCL 15.363.

In contrast, MCL 333.20176a does not state that an employee who reports malpractice is protected under the WPA. Rather, MCL 333.20176a(2) provides that a health facility or agency is subject to the sanctions allowed by MCL 333.20165, which include denial, limitation, suspension, or revocation of licensure or certification, or an administrative fine. Subsection (2) also increases the potential administrative fine to $10,000 per violation, as opposed to the amounts allowed as a sanction under MCL 333.20165.[1]

The difference between MCL 333.20180 and MCL 333.20176a is meaningful. "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). "The rule, in pari materia, does not permit the use of a previous statute to control by way of former policy the plain language of a subsequent statute; much less to add a condition or restriction thereto found in the earlier statute and left out of the later one." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157-158; 189 NW 1006 (1922). See also, *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011)("Generally, when language is included in one section of a statute, but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion.")

[1] MCL 333.20199(1) states: "Except as provided in subsection (2) or section 20142, a person who violates this article or a rule promulgated or an order issued under this article is guilty of a misdemeanor, punishable by fine of not more than $1,000.00 for each day the violation continues or, in case of a violation of sections 20551 to 20554, a fine of not more than $1,000.00 for each occurrence."

The omission of any reference to the WPA in MCL 333.20176a demonstrates that the Legislature did not intend to create a civil remedy for a person alleging that a health facility or agency took employment action in retaliation for reporting malpractice. Rather, the Legislature intended that a health facility or agency that engaged in prohibited retaliatory action would face the penalties stated in MCL 333.20176a(2), *i.e.* licensing sanctions and administrative fines.

The Legislature's intent to enforce MCL 333.20176a through administrative sanctions is further confirmed by MCL 333.20176. Subsection (1) of the latter statute provides that "a person may notify the department of a violation of this article . . . that the person believes exists." Taking retaliatory action in response to a report of malpractice would be a violation of Article 17. The department "shall investigate" a written complaint and "shall notify the complainant" of the investigation results and intended action. If the person making the report is aggrieved by the department's decision, an appeal to the department's director is permitted. MCL 333.20176(2).

An implied cause of action for wrongful discharge should not be judicially recognized as a way to supply a remedy the Legislature chose to omit from MCL 333.20176a. As a general rule, "where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive." *Pompey v Gen Mtrs Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). Hospital employees were not protected under common law against adverse employment actions taken in retaliation for reporting malpractice. The duty imposed on hospitals to not take retaliatory action was created by MCL 333.20176a. The specific remedies provided by the Legislature for violating the statute are exclusive.

The abiding principle, as stated in *Farrington*, is clear: "this Court may not do on its own accord what the Legislature has seen fit not to do." 442 Mich at 210. This tenet applies when deciding whether there is an implied cause of action for wrongful discharge. *Dudewicz*, 443 Mich at 78 (citing *Pompey*). See also, *Vagts v Perry Drug Stores*, 204 Mich App 481, 484; 516 NW2d 102 (1994)(where a statute explicitly proscribes a particular adverse employment action, that statute is the exclusive remedy, and no other public policy claim for wrongful discharge can be maintained; citing *Dudewicz*).

The Court of Appeals did not address the principle established in *Dudewicz* that "[a] public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." 443 Mich at 80. In his brief, Landin appears to misunderstand *Dudewicz*, arguing that the lack of a WPA remedy in MCL 333.20176a means that a wrongful discharge claim should be implied. Plaintiff-appellee's brief, pp. 46-47. The holding in *Dudewicz* does not apply because a WPA remedy is provided. Rather, the principle applies because the Legislature has enacted a statutory prohibition against retaliatory discharge and has prescribed the available remedies.

When enacting a statute and creating a right or duty, the Legislature has the authority to determine whether to provide a remedy, and if so, what remedy to allow. *Dudewicz* respects the Legislature's role by holding that a court should not judicially imply a common-law tort remedy when the Legislature has elected to provide a specific remedy—or no remedy at all—when adopting a statutory prohibition against retaliatory discharge. [2]

[2] *Phillips v Butterball Farms Co*, 448 Mich 239, 248-249; 531 NW2d 144 (1995)(implied wrongful discharge claim "sounds in tort, not contract.")

Because the Legislature did not provide a civil remedy for violating MCL 333.20176a, the Court of Appeals erred by implying a tort cause of action for wrongful discharge.

II. The implied wrongful discharge claim recognized by the Court of Appeals is equivalent to an implied private right of action under the Public Health Code.

The practical effect of the Court of Appeals' decision is recognition of an implied private right of action under MCL 333.20176a. Applying the standards established by this Court, a private right of action should not be implied when the Legislature expressed its intent to enforce the prohibition against retaliatory action through administrative sanctions and fines, and omitted the civil remedy provided in a related statute.

It is difficult to discern a line between an implied cause of action for wrongful discharge based on a statutory violation and an implied private right of action to enforce a statute. The close connection—if not theoretical identity—was noted in *Casias v Wal-Mart Stores, Inc*, 764 F Supp 2d 914 (WD Mich 2011), aff'd 695 F3d 428 (CA 6 2012). The plaintiff, a qualified and registered medical marijuana patient, was terminated from employment after testing positive on a drug screen. *Id*. at 916. Because the Michigan Medical Marijuana Act does not protect against actions by private employers, the plaintiff argued both theories, *i.e.* that the act provided an implied private right of action, and alternatively, the discharge violated public policy. The district court dismissed both claims. *Id*. at 921.

Noting the "strictness of the current test" for implying a private right of action under *Lash v Traverse City*, 479 Mich 180, 192-93; 735 NW2d 628 (2007), the court said:

> One may reasonably ask whether [the wrongful discharge] theory is anything but an end run on the stringent private

> cause of action test. After all, if the alleged public policy at issue is created by statute, and if the statute does not itself create a private cause of action to enforce the policy, where does a court receive the power to create a remedy anyway? This would seem to do under the rubric of "public policy" exactly what the Michigan Supreme Court prohibits in *Lash*: namely, implying a private cause of action in the absence of legislative intent.
>
> *Casias*, 764 F Supp 2d at 921.

The same question can be asked here. Because MCL 333.20176a does not provide a civil remedy for adverse employment action taken in retaliation for reporting malpractice, an implied wrongful discharge claim is nothing more than an implied private right of action. Under either theory, an employee would seek damages based on an alleged violation of the statutory prohibition.

This Court has "refused to impose a remedy for a statutory violation in the absence of evidence of legislative intent." *Lash*, 479 Mich at 193. See also, *Anstey*, 476 Mich at 445 n 7 (when a statute does not provide a remedy, a court "may not create a remedy that only the Legislature has the power to create"). The enactment of a statutory duty does not automatically confer a right on the class of persons benefited by the statute to sue for violations. Rather, the statute must contain either an express or implied private right of action. *Office Planning Gp, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 496-497; 697 NW2d 871 (2005); *City of S Haven v Van Buren Co Bd of Comm'rs* , 478 Mich 518, 528-529; 734 NW2d 533 (2007).

As explained in the previous section, MCL 333.20176a does not contain an express private right of action. The difference between MCL 333.20180 and MCL 333.20176a militates against implying a private right of action. "[T]he fact that the Legislature has explicitly permitted damage suits in other provisions . . . provides persuasive evidence that

the Legislature did not intend to create a private cause of action for violation of this particular provision." *Lash*, 479 Mich at 196.

The Court of Appeals' recognition of an implied wrongful discharge claim under MCL 333.20176a is inconsistent with the cases holding that there is no private cause of action to enforce other provisions in the Public Health Code. In *Fisher v WA Foote Mem'l Hosp*, 261 Mich App 727; 683 NW2d 248 (2004), the Court of Appeals refused to recognize an implied private right of action to redress a violation of MCL 333.21513(e). That provision in Article 17 prohibits a hospital from discriminating based on race, religion, color, national origin, age, or sex in the operation of the hospital.[3] The court reasoned that "[b]ecause the code does not expressly create a private cause of action, the claim is precluded if the code provides an adequate means of enforcing its provisions." *Fisher*, 216 Mich App at 730. The court reviewed the statutory enforcement mechanisms:

> MCL 333.20165(1)(b) provides for the limitation, suspension, or revocation of a health facility license, as well as an administrative fine on a hospital that violates a provision contained in the code. Further, MCL 333.20176 requires the department of health to investigate a health facility upon written complaint of a person who believes that the facility violated the code. Also, MCL 333.20177 allows the director of the department of health to request that a prosecuting attorney or the Attorney General bring an action to restrain or enjoin actions in violation of the code. Finally, MCL 333.20199 makes violation of a provision of the code a misdemeanor

[3] MCL 333.21513(e) states that owner, operator, and governing body of a hospital "[s]hall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry."

> punishable by a $1,000 fine for each occurrence or day that the violation continues.
>
> *Id*. at 730-731.[4]

These are the same enforcement mechanisms available when a health facility or agency takes retaliatory action in violation of MCL 333.20176a.

This Court recently cited *Fisher* when determining that a remedial sanction (waiver of peer review protection) would not be judicially implied to enforce the duty imposed on hospitals to maintain specified information in a patient's medical record under MCL 333.20175(1). *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 262 n 9; __ NW2d __ (2015). As the Court of Appeals did in *Fisher*, this Court referred to MCL 333.20176(1), which provides that any person who believes a health facility or agency has violated Article 17 or a promulgated rule may notify LARA, which is required to investigate the complaint and notify the complainant about the investigation results and proposed action. See, *Grain v Trinity Health*, 431 Fed Appx 434, 448 (CA 6 2011)(Michigan courts have held that the Public Health Code does not create a private right of action).[5]

In *Manzo v Petrella*, 261 Mich App 705, 718; 683 NW2d 699 (2004), the Court of Appeals concluded there was no private right of action under MCL 333.20180, separate from the WPA claim provided in the statute. The plaintiff sued his former attorney for legal malpractice after a WPA claim under MCL 333.20180 was dismissed as untimely. *Id*. at 709-710. The Court of Appeals held that the plaintiff could not meet the "suit within a suit"

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[4] Leave to appeal was initially granted in *Fisher*, 471 Mich 957; 691 NW2d (2005). After briefing and argument, the order granting leave was vacated and leave denied. 473 Mich 888; 703 NW2d 434 (2005).

[5] See also, *Feyz v Mercy Mem'l Hosp*, 475 Mich 663, 678 n 45; 719 NW2d 1 (2006) (MCL 331.531 does not create a private cause of action for malicious actions relating to peer review activities).

requirement because no report was made to a public body as required by MCL 15.361, but instead to a hospital's peer review committee. As a result, the plaintiff did not have a WPA claim that could have been lost through the attorney's alleged untimeliness. *Id*. at 713-714. *Manzo* rejected the plaintiff's alternative argument that he had a separate claim under MCL 333.20180. *Id*. at 716. The court concluded that "a plain reading of MCL 333.20180 demonstrates that no private right of action exists under the section." *Id*. at 718.

As with the implied wrongful discharge claim, the inquiry about an implied private right of action should also begin and end with the statutory remedies enacted by the Legislature. In MCL 333.20180, the Legislature decided to incorporate the remedies available in the WPA as the way to protect employees who report violations of law and unsafe conditions to LARA. In MCL 333.20176a, the Legislature made a different choice. Omitting the WPA remedy provided in MCL 333.20180, the Legislature elected in MCL 333.20176a to instead employ administrative sanctions as the appropriate means to enforce the prohibition against retaliating against employees who report malpractice or act as expert witnesses.

As amicus, MHA believes that the Court of Appeals erred by overriding the Legislature's public policy choices.

III. The WPA does not provide a remedy for an employee subjected to adverse action in retaliation for reporting malpractice to a health facility or agency.

The second question posed by this Court is "whether the Whistleblowers' Protection Act, MCL 15.361 et seq, provides the exclusive remedy for a claim of wrongful discharge under MCL 333.20176a(1)(a)." 497 Mich 988; 960 NW2d 927 (2015). As amicus, MHA

submits that the WPA does not provide *any* remedy for an alleged violation of MCL 333.20176a.

Instead, the Legislature provided for administrative sanctions and fines as the means to enforce the prohibition against retaliatory action. As discussed earlier, "the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative." *Dudewicz*, 443 Mich at 78 (citing *Pompey,* 385 Mich at 552-553). This principle not only precludes a judicially implied cause of action, it also prevents application of the WPA remedy provided in MCL 333.20180, but not in MCL 333.20176a.

The Court of Appeals did not closely examine the protected activities in MCL 333.20176a. The statute prohibits a health facility or agency from taking or threatening to take adverse employment action in three circumstances, *i.e.* when an employee or an individual acting on the employee's behalf:

- Reports or intends to report a violation of articles 7, 8, 15 or 17, or a rule promulgated under those articles;
- Reports or intends to report the malpractice of a health professional; or
- Acts as an expert witness in a civil malpractice suit or in an administrative action.

The WPA would *directly* protect an employee who reports or intends to report to LARA a violation of the specified Public Health Code articles, or rules promulgated under those articles. MCL 15.362 applies when an employee "reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this State . . . ." Assuming the other WPA requirements are met, an employee

subjected to retaliatory action for an actual or intended report to LARA of a statutory or rule violation could bring a civil action directly under MCL 15.363(1).

However, a civil suit under the WPA is not an available remedy for an employee who reports malpractice to a health facility or agency or acts as an expert witness. As the Court of Appeals correctly noted, a report of malpractice does not "necessarily allege a violation of the Public Health Code." *Landin*, 305 Mich App at 533. Accordingly, the threshold requirement for a WPA claim, *i.e.,* a report to a public body of a statutory or rule violation, would not be satisfied.

IV. Recognizing an implied cause of action premised on reporting malpractice creates unavoidable conflicts with the statutes prohibiting disclosure of privileged patient information and protecting peer review material.

In addition to disregarding the remedies prescribed by the Legislature in MCL 333.20176a, the Court of Appeals' recognition of an implied cause of action leads to a direct conflict with the statutes protecting privileged patient information and peer review material.

The triggering event for an implied wrongful discharge claim under MCL 333.20176a would be an employee's actual or intended report of malpractice by a health professional. In this case, the reasons for Landin's termination "would be *proved only by reference to patient records* . . . ." *Landin*, 305 Mich App at 536-537 (emphasis added). In any wrongful discharge case, the plaintiff would have to prove that another health care provider committed malpractice in the care of a patient at a health facility or agency. To defend against the claim, the health facility or agency would prove that there was no malpractice to report. The facts about care and treatment provided to a patient would be front and center in the litigation.

In this case, the patient allegedly subjected to malpractice as reported by Landin was not a party. Nor were the patients involved in the incidents that allegedly gave HealthSource reason to terminate him. None of these patients consented to have their confidential health information disclosed and used in this litigation.

A. Litigating the wrongful discharge claim would require disclosure of privileged patient information.

The need to protect confidential patient information in litigation between other parties was recognized in *Schechet v Kesten*, 372 Mich 346; 126 NW2d 718 (1964). The chair of surgery at a hospital submitted a report critical of another surgeon's competence to the hospital's credentials committee. The criticized surgeon sued for defamation and submitted interrogatories about the cases involved in the critical report. This Court held that physician-patient privilege prohibited disclosure of the requested information. *Id*. at 350-351. The patients were not parties and had not consented to disclosure. As a result, the statutory privilege "imposes an absolute bar." The "veil of privilege is the patient's right. It prohibits the physician from disclosing, in the course of any action wherein his patient or patients are not involved and do not consent, even the names of such noninvolved patients." *Id*. *Schechet* was followed in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 28-29; 594 NW2d 455 (1999), where this Court held that a hospital was prohibited from disclosing the identity of patients who were not parties to the litigation and had not waived the physician-patient privilege.

The bar against disclosure of information about non-consenting patients has been enforced in a public policy wrongful discharge case. *Baker v Oakwood Hosp Corp*, 239 Mich App 461; 608 NW2d 823 (2000). A nurse alleged her employment was terminated in retaliation for her objections to a physician's illegal and unethical conduct in a research

study. *Id*. at 465. The nurse sought discovery of case histories and records of patients involved in the study. Following *Schechet*, the Court of Appeals held that the privilege barred disclosure of the requested patient information. *Id*. at 470-471, 479.

The Court of Appeals applied *Schechet* in another non-medical litigation. In *Isadore Steiner, DPM, PC v Bonanni*, 292 Mich App 265, 275; 807 NW2d 902 (2011), a podiatric practice sued a formerly employed physician for breach of a non-solicitation/non-compete clause. The court held that the physician-patient privilege prohibited disclosure of the former employee's patient list. *Id*. at 267, 275-277. See also, *Popp v Crittenton Hosp*, 181 Mich App 662; 449 NW2d 678 (1989)(plaintiff not entitled to name and medical records of nonparty patient); *Dierickx v Cottage Hosp Corp*, 152 Mich App 162, 164-165; 393 NW2d 564 (1986)(hospital could not obtain records of plaintiff's children); *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 470-472; 608 NW2d 823 (2000).

In this case, the parties have referred to the patients by first name ("Jack") or first name and initial ("Scott B."). That effort, while well-intentioned, does not eliminate the problem. "[T]he physician-patient privilege prohibits disclosure even when the patient's identity is redacted." *Meier v Awaad*, 299 Mich App 655, 667; 832 NW2d 251 (2013)(citing *Johnson v Detroit Med Ctr*, 291 Mich App 165, 169; 804 NW2d 754 (2010). See also, *Baker*, 239 Mich App at 475.

The Court of Appeals held that Landin could not be compelled to return the patient records he removed from the hospital because "[t]he materials were already disclosed and used by both parties, for better or worse." *Landin*, 305 Mich App at 537. This Court did not grant leave to decide whether this holding is correct. As amicus, MHA believes the Court of Appeals is plainly wrong because only the patient can waive the privilege. *Dorris*, 460 Mich

at 39. Regardless, the use of patient records by the parties in this case is a compelling example of how litigating implied wrongful discharge claim based on reporting malpractice would compromise the confidentiality of patient information.

The administrative remedies supplied by the Legislature in MCL 333.20176a do not present the same concerns. MCL 333.16244(2) provides that the physician-patient privilege does not apply during an investigation or proceeding conducted by LARA or the licensing boards and disciplinary subcommittees. Absent waiver, the information is "confidential and shall not be disclosed except to the extent necessary for the proper functioning" of the department, licensing boards, and disciplinary subcommittees. *Id*. The Legislature has determined that an exception to the physician-patient privilege is warranted when LARA is enforcing the Public Health Code. It did not make a similar exception to the privilege in private litigation between third parties, and this Court has held that such an exception cannot be judicially created.

B. Litigating an implied wrongful discharge claim would compromise the statutory protection for peer review material.

In a hospital setting, a report of malpractice by a health care professional would almost always implicate peer review and quality improvement functions. Hospitals require employees to prepare incident reports about unexpected outcomes and adverse events, some of which may include concerns about possible malpractice by health care professionals. Indeed, Landin's claim is based on a "variance/concern report" regarding a fellow nurse's care of a patient. Hospitals must review and investigate patient care concerns brought to their attention in incident reports or raised by employees through

other means. Those responsibilities are carried out by individuals and committees engaged in professional review activities.

The statutory protections for incident reports were recently considered by this Court in *Krusac*, *supra,* 497 Mich 251. Under the applicable statutes, "[t]he records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency . . . are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena. " MCL 333.20175(8). See also MCL 333.21515. The type of incident report prepared by Landin, as well as the review, investigation, and response by HealthSource, would be protected against disclosure in discovery or use in litigation. *Krusac*, 497 Mich at 257 (citing *Dorris*, 460 Mich at 40). The statutory peer review protections apply to any litigation, and are not limited to malpractice actions. *Atty Gen v Bruce*, 422 Mich 157, 164-165; 369 NW2d 826 (1985).

Difficult, and perhaps dispositive, questions under the peer review statutes would frequently arise in wrongful discharge claims based on reports of malpractice. If an employee claimed that a hospital took retaliatory action in response to submitting information about potential malpractice in an incident report, he or she would be prohibited from inquiring into the hospital's review and response to the report. Conversely, a hospital might not be able to disclose the results of its peer review investigation to demonstrate that the employee's report did not involve malpractice. The list of possible entanglements is endless, and would lead to frequent disputes about the applicability of peer review protections.

CONCLUSION

Hospitals should—and do—encourage employees, contractors, and other individuals to raise and report concerns about patient safety, including instances where the care provided by health care professionals may not meet appropriate standards. Indeed, MHA's member hospitals *require* employees and others to submit incident reports so that these issues can be thoroughly reviewed and investigated through peer review and quality improvement processes.

In MCL 333.20176a, the Legislature properly determined that hospitals should be prohibited from taking retaliatory action against employees who report malpractice. MHA and its members agree: hospitals must refrain from employment actions that could deter or discourage employees from doing their part to identify and report concerns about the quality of patient care. No employee should worry that raising concerns about patient care will lead to adverse employment consequences.

MHA and its members also agree with the Legislature's determination that licensing sanctions and administrative fines are the appropriate way to deal with hospitals that engage in retaliatory action, and fail to promote the overriding goal of promoting public health and safety. Recognizing an implied wrongful discharge claim not only disregards the Legislature's choice of statutory remedies, it is also counterproductive. Hospitals should not have to question the motives of an employee who makes a report about care provided to a patient. The focus should be on investigating and responding, rather than wondering whether the report is intended to raise a legitimate concern or whether it is designed to gain protection against future employment action.

As amicus, MHA submits that the Court of Appeals erred by not respecting the Legislature's choice of remedy for violations of MCL 333.20176a and recognizing an implied cause of action for wrongful discharge.

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